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No. 98-923

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

BANQUE PARIBAS LONDON, PARIBAS GLOBAL BOND FUTURES FUND, PARIBAS ASSET MANAGEMENT LTD. and JOHN ARIDA,
Cross-Petitioners,

v.

EUROPE AND OVERSEAS COMMODITY TRADERS, S.A.,
Cross-Respondent.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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CROSS-RESPONDENT'S BRIEF IN OPPOSITION

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CROSS-RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case concerns the sale of unregistered securities to the cross-respondent by means of alleged false and fraudulent representations by the cross-petitioners. The representations were made to cross-respondent's only

principal and shareholder, Alan Carr. Mr. Carr is a citizen of Canada, but the securities were sold to cross-respondent, acting through Mr. Carr, while he was staying at his winter home in Florida. The courts below dismissed cross-respondent's fraud claim because, in their view, Section 10(b) of the Securities Exchange Act of 1934 and Section 12 of the Securities and Exchange Act of 1933 do not protect foreign entities from fraudulent practices by foreign sellers or from the sale of unregistered securities, even if the foreign seller uses instrumentalities of interstate commerce to target a buyer in the United States. As shown in our petition for writ of certiorari, this position taken by the courts below conflicts with the view of the Securities and Exchange Commission ("SEC") as set forth in the SEC's *amicus curiae* brief in the court of appeals and exacerbates an existing conflict among the circuits over the protection afforded by American securities laws to foreign citizens who purchase securities while they are present on American soil. The Second Circuit's decision also conflicts with principles articulated by this Court concerning the heightened deference that should be given to the SEC in the interpretation of its own rules and regulations.

The district court stated, as an alternative ground for the dismissal of cross-respondent's fraud claim, that the doctrine of *forum non conveniens* warranted dismissal. This finding of the district court was not addressed by the Second Circuit. Nor did the Second Circuit rely on *forum non conveniens* in affirming the decision of the district court.

The district court's *forum non conveniens* determination merely applied the considerations enumerated by this Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), to the peculiar facts of this case. While there was considerable dispute between the parties as to the relevant facts, there was no controversy as to the legal standard. In

short, the district court's *forum non conveniens* determination was the type of fact-bound ruling that has long been recognized as unsuitable for review by this Court. Moreover, we agree with cross-petitioners that its claim of *forum non conveniens* is not waived if the cross-petition is denied, and that issue may be revisited in the lower courts if the case is remanded.

REASONS FOR DENYING THE CROSS-PETITION

I

FORUM NON CONVENIENS IS A FACT-BOUND DETERMINATION THAT IS NOT SUITABLE FOR REVIEW ON WRIT OF CERTIORARI

It is axiomatic that this Court does "not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Indeed, "the absence of a legal controversy of importance or of a direct conflict as to legal issues will dictate a denial of certiorari in a case where merely the facts are in dispute." Robert L. Stern *et al.*, *Supreme Court Practice* 189 (7th ed. 1993). Relying on this rule, the Court has dismissed cross-petitions for certiorari as improvidently granted that, like cross-petitioner's, "presented [the Court] primarily with a question of fact." *NLRB v. Hendricks City Rural Elec. Corp.*, 454 U.S. 170, 177 n.8 (1981); *accord, Rudolph v. United States*, 370 U.S. 269 (1962) (*per curiam*); *Southern Power Co. v. North Carolina Public Serv. Co.*, 263 U.S. 508 (1924).

There are few issues that are as fact-bound as the application of the doctrine of *forum non conveniens*. As this Court emphasized in its discussion of *forum non conveniens* in *American Dredging Co. v. Miller*, 510 U.S. 443, 455

(1994) (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1994)), the doctrine defies the use of "*per se* rules" because "each case turns on its facts." As a result, this Court, in accord with its general practice, has only granted certiorari in *forum non conveniens* cases to resolve questions of law. *E.g., American Dredging*, 510 U.S. 443 (certiorari granted to consider whether federal law pre-empts state law on *forum non conveniens* in Jones Act cases); *Reyno*, 454 U.S. 235 (certiorari granted to resolve conflict among the courts of appeals as to whether plaintiff could defeat motion to dismiss on *forum non conveniens* grounds by showing that the substantive law of the alternative forum is less favorable).

Cross-petitioners have not pointed to any ruling of law that requires review here. In the absence of such a showing, there is simply no issue presented that is worthy of review.

II

CROSS-PETITIONERS MAY RENEW THEIR *FORUM NON CONVENIENS* CLAIM IF THE CASE IS REMANDED

We agree with the cross-petitioners that they will be free to renew their defense of *forum non conveniens* if the case is remanded. But appellate review of the *forum non conveniens* issue is more appropriately undertaken in the first instance by the Second Circuit than by this Court. Because the resolution of the issue requires an extensive review of the factual record, this Court should rely on the Second Circuit to provide the appellate review which the cross-petitioners seek.

In any event, we submit that the district court's balancing of the relevant *forum non conveniens* factors under *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), would be reversed by the

Second Circuit if this Court determines, as we will be arguing on the merits if the petition is granted, that the United States has a substantial interest in protecting its residents against the fraudulent sales practices of foreign securities dealers (Pet. App. B, pp. 51a-52a).

CONCLUSION

For the foregoing reasons, the cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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